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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

NO. 265

JOSEPH S. BAYSEK, JR., Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOSEPH A. ROSSI,
Counsel for Petitioner.

1208 Plaza Building
Pittsburgh 19, Pennsylvania.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, JOSEPH S. BAYSEK, JR., respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Third Circuit, entered May 14, 1954, and on July 9, 1954, denying a rehearing.

I.

OPINION BELOW.

The Opinion of the Court of Appeals (App. 21) is reported in 212 F. 2d 446.

II.

JURISDICTION.

The judgment of the Court of Appeals, (App. 26), was filed and entered May 14, 1954, and the Order denying the rehearing was filed and entered July 9, 1954, (App. 27). The jurisdiction of the Court is invoked under 28 U. S. C. Sec. 1254 (1) (1946).

III.

QUESTIONS PRESENTED.

1. After instructing the Jury on character testimony, substantially as requested, does the addition of the statement by the Trial Judge "if you are satisfied however that the defendant is guilty, you should convict him, notwithstanding proof of good character," create a diminution of the effect of the character evidence; and, when coupled with the Trial Judge's later explanation that the addition was given "deliberately" and with "malice aforethought" constitute reversible error?

2. Did the Court commit harmful error in refusing to grant a mis-trial, when Counsel for the Government in his closing speech to the Jury, with comment and

sinister innuendo, unfairly attacked the integrity of one of the Petitioner's character witnesses, whose testimony the Record shows, does not suggest in any way any misrepresentation of the reputation of the Petitioner, and whose testimony the Government had not sought to impeach or contradict?

3. Was the verbal assault made by Government Counsel, Henry G. Owen, upon Petitioner's Counsel, Joseph A. Rossi, Esquire, in calling the latter "you cheap chiseler", without cause or provocation, wholly unjustifiable, defamatory, and prejudicial to Petitioner's cause?

IV.

STATEMENT OF THE CASE.

The appellant, Joseph S. Baysek, Jr., was convicted in the United States District Court for the Western District of Pennsylvania, at No. 13799—Criminal, on an indictment containing two counts, charging him and Frederick H. Altmeyer and Stanley J. Barczak, (the said Frederick H. Altmeyer not being indicted and not a defendant in said indictment), with violation of *Section 872 of Title 18, U. S. Code,* on the first count, and with violation of *Section 371, Title 18, U. S. Code,* on the second count.

The first count charged Baysek with aiding and abetting Frederick Altmeyer, an officer and employee of the United States, to wit, a Deputy Collector of Internal Revenue for the 23rd U. S. Internal Revenue Collection District of Pennsylvania, under color of Altmeyer's

office, to commit an act of extortion by demanding and obtaining the sum of $4,101.18 from one Harry Feldman as additional taxes purportedly due and owing to the United States by the said Harry Feldman.

The second count charged Baysek, the appellant, with conspiring together and with Altmeyer and Barczak, to extort the aforesaid sum of money from the said Harry Feldman, as alleged additional taxes owing for the years 1948 and 1949.

The appellant, Baysek, was sentenced to a term of three (3) years on Count 1, and to a term of five (5) years, both sentences to run concurrently—no fine—no costs.

The Government adduced the following testimony—that Altmeyer, a co-defendant, who had previously pleaded guilty, and called as a government witness, was at the time of the alleged offenses a Deputy Collector of Internal Revenue, at Pittsburgh, Pa. He had been assigned to investigate the Income Tax returns of one Harry Feldman of Homestead, Pa., for the years of 1948 and 1949. He testified that he had been given the assignment sometime in September 1951, but that he did not visit Feldman until October 1, 1951, for the first time. That he first met Feldman on said date at his place of business — the Lincoln Cafe — in Homestead, identified himself and stated that he was there on official business concerning Feldman's returns. After some conversation, Feldman told Altmeyer that he knew he was involved, but having been in trouble before, he wanted to avoid any further trouble. Altmeyer testified that from what examination he made that day, Feldman owed an additional tax in the neighborhood of about $1,000.00, more or less. This information, Altmeyer did not com-

municate to Feldman at any time. Feldman, Altmeyer testified, that he informed him (Altmeyer) that he had about $5,000.00 to $6,000.00 in the bank, and if Altmeyer would take care of preparing corrected returns and paying the amount of additional taxes due, and leave him (Feldman) about $1750.00, with which to renew his liquor license and buy some liquor and beer stock for his business, then Altmeyer could keep the rest. Altmeyer said nothing to Feldman regarding the acceptance of this proposition, but stated that he would have to go to Feldman's bank and examine the safe deposit box which was ascertained from Feldman to be in the name of Feldman's wife and daughter. Altmeyer kept this appointment a day of two later, going to the bank with Mrs. Feldman, but found no other taxable assets. Altmeyer and Mrs. Feldman returned to Feldman's place of business and it was arranged that he would return the following day, October 4, 1951, to close the case. Altmeyer returned on that date and received from Feldman a brown envelope, which was sealed, which Feldman had gone to the bank to obtain, while Altmeyer waited at the Lincoln Cafe. This package contained, according to Feldman, $5,183.63. Altmeyer was asked by Feldman if he was not going to count it and Altmeyer replied that if Feldman said there was that much money in this sealed brown envelope, that was it, and there was no need to count it. Altmeyer testified that he then placed the brown envelope in a white envelope and sealed it and proceeded to give Feldman a receipt for $5,183.63.

Altmeyer, further testified that he never made any official report of any of his meetings with Feldman, as was required by the Department, on forms for that purpose, until sometime in December of 1951, when he

turned in to the Government, the sum of $1,082.45, the amount of additional taxes due, which amount the Government does not dispute as not being correct. Altmeyer, further testified, that after his first visit to Feldman, in Homestead, Pa., he proceeded to downtown Pittsburgh, Pa., where he "accidentally ran" into the appellant, Baysek, on the street. He told the appellant about this unusual offer, made by Feldman, and said he did not know what to do as he never had anything like that confront him before. The appellant, thereupon told Altmeyer, (and this is Altmeyer's testimony—Transcript of Testimony of Proceedings of September 2, 1953, at Page 42) "You don't want to see me; you ought to see Stanley Barczak". Altmeyer and the appellant proceeded to appellant's office on the North Side of the City of Pittsburgh and further conversation was had between the two. Altmeyer testified that while he knew Barczak for sometime, having worked with him in the Internal Revenue Office, he did not know where to locate him. The appellant then told Altmeyer that Barczak usually came into his office every day, as he was unemployed and doing nothing, and that he (appellant) would make an appointment for Altmeyer that evening. Altmeyer then left and returned about 6:30 P. M. Then the three defendants, including the appellant, discussed the Feldman matter and certain agreements were entered into by the three of them. One of the agreements was that on the day that Altmeyer would receive the money from Feldman, Barczak was to be in Homestead, at the 220 Bar, across the street from Feldman's Lincoln Cafe, for the purpose of taking charge of the money received and be custodian of it, until it was divided between Altmeyer, Barczak and the appellant, after payment of the tax due the U. S. Government.

Thereafter, a number of meetings were held between the three defendants, certain advancements were made to Altmeyer, as he needed some money, and finally, about the middle of October the money, less that portion due to the Government, was divided in three parts, at which time Altmeyer, Barczak and the appellant were present.

Barczak, who pleaded guilty after the second day of the trial, was then called as a Government witness and testified that he had been at Feldman's on two or three occasions and that he did receive the package of money from Altmeyer, it having been arranged between Altmeyer and Barczak, at the appellant's suggestion, that Barczak hold the money for "security reasons", until it would be divided. Barczak testified, however, that when he counted the money, the package only contained "$4,900.00 and some dollars, with a few hundred dollars short", (Transcript of Proceedings of September 2, 1953, Page 198). He corroborated Altmeyer in most respects pertaining to meetings of the three of them, at the appellant's office and at Barczak's room on the North Side, near the appellant's office. Barczak, when confronted with a lengthy statement which he had previously given to the Intelligence Division of the Internal Revenue Bureau, under oath, at the time of which examination of Barczak by the Intelligence, Barczak protested his innocence and that of the appellant, but which statement he refuted at the trial as being false, in the most part. Barczak testified further that the money was in $50.00 bills and had wrappers of the Peoples-First Bank around them. The additional "some dollars" was in smaller denominations. This witness also testified that the appellant received his share, amounting to about $1,300.00.

Feldman, called by the government, testified as to Altmeyer's first visit, of his return to examine the safety deposit box with Mrs. Feldman, and his return on October 4, 1951, when he turned over to him (Altmeyer) $5,183.63, not in a brown envelope, but exposed, $5,000.00 of which were in $50.00 bills and the balance made up of smaller denominations and some change. Feldman said that he protested the amount, but that Altmeyer told him that was the tax. On inquiry by the witness of Altmeyer, when the money was turned over, as to what would happen if he did not pay, Feldman said that Altmeyer's response was that "You know, there are Federal Penitentiaries." (Altmeyer in his testimony denied making any threats and testified that Feldman turned over the money willingly.) Feldman, further testified that he never had any contact or conversation with the appellant and Feldman further testified that he never saw the appellant until the day that he saw him in front of the Grand Jury Room in the Federal Building, in Pittsburgh.

One Anthony T. Sinansky, a bartender at the 220 Bar, called by the Government, testified that he saw Barczak at his place of business (where he was employed) on or about the 4th day of October 1951, arriving there about 9:00 A.M., remaining about one hour and continually looking out of the window at the Lincoln Cafe, across the street. The witness testified he did not know Altmeyer or the appellant and had never seen or talked to either of them before. He further testified that Barczak, some time about five months before the trial, had visited his place of business again (220 Bar) and the reason for it was to ask him not to testify or to testify in a case in which he was in some kind of trouble.

The direct and cross-examination of Sinansky had been completed, and Petitioner's Counsel, Mr. Rossi, said, "That is all, Mr. Sinansky", Government Counsel, Mr. Owen, sitting and reading from a sheaf of papers which he had in his hands, then said, "Just a minute". Mr. Rossi, then, from his chair on the defense side of the table, whispered across to Mr. Owen, "If that is a statement which you have from this witness, produce it and it will facilitate matters"; whereupon, Mr. Owen arose from his chair and loudly and disdainfully yelled, to Mr. Rossi, "You cheap chiseler". Mr. Rossi called the attention of the Court to the remark, and the Court admonished Government Counsel.

Baysek's testimony was a complete denial of any guilt; and the introduction of witnesses attesting to his good reputation. The appellant admitted meeting with Altmeyer on or about October 1, 1951, but not "accidently" but at his office where Altmeyer came to visit him. He admitted that Altmeyer told him about Feldman's proposition and that he (appellant) told him "you don't want me, you ought to see Stanley Barczak", whom Altmeyer knew.

The appellant further told Altmeyer that he was busy, that his father was very ill and he was not interested in the Feldman case. The witness admitted he suggested Barczak because the latter was in need of business and did agree to inform Barczak that Altmeyer wanted to see him, if Barczak came to the office, as he was accustomed to do.) He testified he never knew or met Feldman, or his wife, or Sinansky. He further testified that Barczak and Altmeyer were having some trouble on the division of the money in the Feldman

matter and that Barczak wanted the appellant to tell Altmeyer that he had received $1,000.00 from him (Barczak), which the witness refused to do. Barczak told the appellant that he had checked on Altmeyer and that he had found out that Altmeyer had received $7,500.00 from Feldman and now wanted one-half of the balance of $4,900.00. The appellant told Barczak that he did not receive anything and he would not say that he had when he hadn't and that he wanted no such money of that type. The appellant denies being at the first conference between Barczak and Altmeyer on October 1, 1951, at 6:30 P.M., but that Altmeyer returned to his office, that day at 5:30 P.M., that Barczak was there, and they went to one part of appellant's office, and he (appellant) remained at his desk, preparatory to leaving the office to go home, where his father was seriously ill and that he did not engage in the discussion going on between Altmeyer and Barczak. The appellant told them to close the office when they were through.

As to the meeting of October 3, 1951, as alleged by Altmeyer and Barczak that the appellant attended, this was denied and the appellant testified and introduced hospital records to show that that was the evening when his father was taken to the hospital and he accompanied his father there. The appellant denied any and all other meetings to which the other two defendants testified.

The appellant testified that he had nothing to do with the preparation of the returns of Feldman and this was admitted by Altmeyer, and so testified to by him.

Testimony was closed and counsel were directed by the Court to present their arguments to the Jury. Both

of Petitioner's Counsel, Mr. Rossi and Mr. Callahan, completed their arguments and they were then followed by Mr. Owen, one of Government Counsel. It was during the argument by Government Counsel that one of the Petitioner's character witnesses, Felix Vittone, Acting Assistant to the District Director of the Pittsburgh District, Bureau of Internal Revenue Department, New Federal Building, Pittsburgh, was attacked with comment and sinister innuendo, by insinuating Vittone's association with racketeers, and insinuating that the other character witnesses were likewise linked; when, as a matter of fact, the Government had not sought to impeach or contradict, either by presenting witnesses, or by cross-examination of the character witnesses that they had misrepresented the reputation of the Petitioner. A motion was made to withdraw a juror; it was summarily denied; and an exception noted. No admonition was given the Jury by the Court to disregard Government Counsel's remarks, except the Trial Judge's metaphor, to-wit, "Counsel, I think it's about six of one and a half a dozen of the other", and stating "You may proceed. We are not prosecuting anybody but the Defendant in this case."

The Court then charged the Jury. Petitioner's Counsel submitted twenty-six (26) points for instruction. Point No. 25, as requested was as follows:

> "Where evidence against a defendant consists entirely of testimony of self confessed accomplices and the defendant introduces evidence of good character, that evidence of the good character of the defendant is not mere make-weight, but is substantive evidence and must be considered by you, and

may of itself raise a reasonable doubt in your mind, or along with other evidence in the case may raise a reasonable doubt in your mind as to the guilt of the defendant, and therefore, work an acquittal. The very object of introducing good character evidence in to generate in the minds of the jury a reasonable doubt as to the defendant's guilt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing. (*Edgington v. United States,* 164 U. S. 361; *United States v. Quick,* 128 F. 2d 832).")

However, the Court charged as follows:

"* * *" "Where evidence is introduced by a Defendant of good character, that evidence of the good character of the Defendant is not mere makeweight, but is substantive evidence and must be considered by you, and may of itself raise a reasonable doubt in your mind, or, along with other evidence in the case, may raise a reasonable doubt in your mind as to the guilt of the Defendant, and therefore work an acquittal. The very object of introducing good character evidence is to generate in the minds of the jury a reasonable doubt as to the Defendant's guilt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing. **If, however, you are satisfied the Defendant is guilty, you should convict him, notwithstanding proof of good character."**

After the Charge was completed, among other specific exceptions taken, a specific objection was taken to the last sentence of the Charge, on character testimony, as given by the Court, which sentence was "If however, you are satisfied the Defendant is guilty, you should convict him, notwithstanding proof of good character."

The Jury retired, and after seven hours of deliberation, returned a verdict of guilty against the Petitioner on both counts of the indictment.

Motions for a New Trial or in the alternative for a Judgment of Acquittal were filed, but were refused.

It was at the argument on these motions that the Trial Judge states that his Charge on the matter of character testimony was correct. He also stated **"That was the law that convicted Hiss."** (A careful examination of the Hiss Case, 182 F. (2d) 195, by Petitioner's Counsel does not support this statement of the Trial Judge.) In the ensuing colloquy, upon this occasion the Trial Judge made these statements, "Just a moment counsel. There is no use in arguing over that instruction. I gave that instruction **deliberately**, and if I am in error the Circuit Court will correct it. I did that with, you might say, **malice aforethought."**

An appeal was taken to the Court of Appeals for the Third Circuit, which Court affirmed the Judgment and Sentence of the District Court.

A Petition for Rehearing was filed in the Court of Appeals and it was denied.

V.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Third Circuit is in conflict with a decision of this Court in *Edgington v. United States,* 17 S. Ct. 72; 164 U. S. 361.

2. The decision of the Court of Appeals for the Third Circuit in the instant case is in conflict with another decision of the Third Circuit on the same point in the case of *United States v. Quick,* 128 F. (2d) 832.

This Court has recognized the full sweep of the **Edgington Rule,** quoted in the **Quick Case,** and that **Edgington Rule** includes the requirement that the jury be charged that established reputation for good character may **alone** generate a reasonable doubt even though the other evidence is to the contrary. The Trial Judge's last sentence in his Charge to the Jury on the matter of character testimony shifted the emphasis to indicate that there should be other evidence in support of the character evidence, — which, of course, constituted a diminution of the effect of character evidence. His last statement to the Jury was of such a nature that it may have affected the minds of the Jury; so as to say to itself, that, if they were convinced of the guilt of the defendant, the character testimony was of no value. This last sentence of the Trial Judge negated the value of the other part of his instruction, howsoever correct it may have been.

It was the Trial Judge's duty, that, wherever he instructed on the matter of guilt, no matter how many times, it was requisite for him to include the proposi-

tion that character testimony had to be considered, always.

The Court of Appeals in their Opinion in the instant case said, "While it might, perhaps, have been better to have said, 'If however, you are satisfied from all the evidence' the Defendant is guilty * * *".

3. The decision of the Court of Appeals for the Third Circuit in the instant case is in conflict with another decision of the Third Circuit on the same point in the case of *United States v. American Die & Instrument Works, Inc., et al.,* F. 2d , (decided May 27, 1954); and also in conflict with an applicable decision of this Court in *Berger v. United States,* 55 S. Ct. 629, 295 U. S. 78.

Appellant feels that the Government's attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. He was guilty of giving unsworn testimony. He was guilty of unfairly attacking the reputation of a high official of the Department of Revenue when he had opportunity to do so by way of cross examination. He was guilty of characterizing all of the reputation witnesses when he spoke disparagingly of one of them, Mr. Vittone. In short, he was guilty of conducting himself in a thoroughly indecorous and improper manner.

The United States Attorney is a representative of a sovereignty whose obligation is to govern impartially. He is a servant of the law. He may prosecute with earnestness and vigor. While he may strike hard blows, he is not at liberty to strike foul ones. It is fair to say

that the average jury has confidence in the officers of its Government and that those officials will observe their obligations concerning an important subject, particularly a criminal trial, with fairness, and any insinuation such as the one which occurred at bar, is apt to carry much weight against an accused when it should carry none.

In the case of *United States v. American Die & Instrument Works, Inc., supra,* the Opinion states that "The closing argument also exceeded all bounds of propriety in an attack upon the twenty character witnesses who had testified to the good reputation of the defendants" and "Yet, the record does not suggest in any way that the character witnesses had misrepresented the reputation of the defendants."

4. The decision of the Court of Appeals for the Third Circuit is in conflict with a decision of the Court of Appeals for the Sixth Circuit in *Volkmor v. United States,* 13 F. (2d) 594.

Whether there has been a correction of abuse of argument by withdrawal of the objectionable parts depends upon whether, on considering the whole case, the error appears to have been so serious that it likely affected the minds of the jury, despite the attempted correction by counsel or court.

In the instant case, Government Counsel, Mr. Owen, after asking the Jury to disregard his remarks about character witness, Vittone, and some of the other character witnesses appearing for the Petitioner, stated, **"But I mentioned that to show the bias that is involved"**, thereby nullifying his attempted withdrawal of his at-

tack on the character witnesses, and thereby making it worse.

The same Government Counsel, Henry G. Owen, who was censored by the Court of Appeals for the Third Circuit in the case of *United States v. American Die & Instrument Works, Inc., supra,* was the individual guilty of the verbal assault made on Petitioner's Counsel, Mr. Rossi. The attack came following the testimony of Government witness, Sinansky. Mr. Owen assailed Petitioner's Counsel by yelling at him, without cause or provocation, **"You cheap chiseler".**

The matter was brought to the attention of the Trial Judge which appears by the following:

"*Mr. Rossi*: That is all Mr. Sinansky.

Mr. Owen: Just a minute.

Mr. Rossi: Did you hear the remark that Mr. Owen made, 'You cheap chiseler'?"

Mr. Owen: The man said to me, 'You give us the statement that you've got.'

Mr. Rossi: I said, 'Give us the statement and we will facilitate'. * * *

The Court: I don't want any such language.

Mr. Rossi: This is the second time that I have been insulted by him.

The Court: There is no occasion for anybody to insult anybody else or apply any fancy phrases to anybody, and counsel's hair is gray enough so he ought to know better, and if the Jury heard any comment of that kind, I am going to have it ordered struck.

Mr. Owen: *The provocation was great.*

The Court: *There is no such thing as provocation.* You lose your temper and say things. The doctor says that is a sign of blood pressure going up.

Mr. Rossi: I will presume I will answer Mr. Owen outside the court.

Mr. Owen: You keep away from me.

Mr. Knapp: May I make a statement? If that is interpreted for as a request for a statement that the defendant may have, I have no such statement.

The Court: Counsel advises they have no such statement.

Mr. Rossi: Very well."

In the case of *Volkmor v. United States, supra,* a case in which the Trial Judge remarked "I do not believe I heard that." (referring to abusive and defamatory remarks made by the Assistant District Attorney), it was held that personal abuse of a defendant by counsel in argument, though the remarks were withdrawn, was error so egregious as to require reversal of a judgment of conviction. The verbal attack on Mr. Rossi was not a case of inadvertence of statement, but of intentional abuse. It was of such a serious nature that the Trial Judge on his own motion should have withdrawn a juror and continued the case, after the matter had been brought to the Court's attention, not denied by Government Counsel; and, unfortunately, all that transpired was not recorded by the Court Reporter, because of the commotion that ensued. The remark was prejudicial to the Petitioner; and it might well be said, that it affected the minds of the jury.

VI.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH S. BAYSEK, JR.,
Petitioner.

JOSEPH A. ROSSI,
Counsel for Petitioner,
1208 Plaza Building,
Pittsburgh 19, Pennsylvania.

APPENDIX.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,180

UNITED STATES OF AMERICA

v.

JOSEPH S. BAYSEK, JR.
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 15, 1954
Before MARIS, KALODNER and STALEY, Circuit Judges.

Opinion of the Court
(Filed May 14, 1954)

By MARIS, Circuit Judge.

Joseph S. Baysek, Jr. and Stanley J. Barczak were charged in the District Court for the Western District of Pennsylvania in the first count of an indictment with aiding and abetting Frederick H. Altmeyer, a deputy collector of internal revenue, to extort $4,101.18 from one Harry Feldman as additional income taxes for the years

1948 and 1949. In count two of the indictment Altmeyer, Baysek and Barczak were charged with conspiracy to commit the offense charged in the first count. Altmeyer pleaded guilty and was called as a witness for the Government. Barczak pleaded not guilty but changed his plea to nolo contendere after the commencement of the trial and then testified as a Government witness. Baysek also pleaded not guilty but he maintained his innocence throughout the trial and introduced evidence as to his good character. He was nonetheless convicted by the jury on both counts and was sentenced by the district court to imprisonment for three years on the first count and five years on the second, to run concurrently. He thereupon took the appeal now before us, contending that the trial judge erred in limiting the number of his character witnesses, in instructing the jury on character testimony and in refusing to withdraw a juror because of alleged prejudicial remarks in the prosecutor's address to the jury. We will consider these contentions in their order.

Baysek called seven witnesses who testified that his reputation for truthfulness and honesty was good. When he sought to call additional witnesses as to his character the trial judge declined to permit him to do so. The trial judge also refused to permit him to note on the record the names and occupations of these additional witnesses. Baysek contends that this was error. We do not agree. The notation upon the record of the names and occupations of unproduced witnesses would obviously have been improper without the consent of the Government. The limitation of witnesses whose testimony will be cumulative of that already received is a matter within the sound

discretion of the trial judge.[1] Here the Government did not attack Baysek's prior good reputation. Particularly in view of that fact the trial judge's determination that cumulative evidence of good character would not serve any proper purpose in the trial was clearly not an abuse of discretion.[2]

The trial judge in his instructions to the jury stated:

> "Where evidence is introduced by a Defendant of good character, that evidence of the good character of the Defendant is not mere make-weight, but is substantive evidence and must be considered by you, and may of itself raise a reasonable doubt in your mind, or, along with other evidence in the case, may raise a reasonable doubt in your mind as to the guilt of the Defendant, and therefore work an acquittal. The very object of introducing good character evidence is to generate in the minds of the jury a reasonable doubt as to the Defendant's guilt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing.

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1. Chapa v. United States, 5 Cir. 1919, 261 F. 775, cert. den. 252 U.S. 583; Hauge v. United States, 9 Cir. 1921, 276 F. 111, 113; Hamil v. United States, 5 Cir. 1924, 298 F. 369, 372; Shaw v. United States, 5 Cir. 1930, 41 F. 2d 26, 27-28; Brady v. United States, 7 Cir. 1930, 41 F. 2d 449, 451; Suhay v. United States, 10 Cir. 1938, 95 F. 2d 890, 894, cert. den. 304 U.S. 580; Burgman v. United States, D.C.Cir., 1951, 188 F 2d 637, 641-642, cert. den. 342 U.S. 838.

2. See Michelson v. United States, 1948, 335 U.S. 469, 480.

If, however, you are satisfied the Defendant is guilty, you should convict him, notwithstanding proof of good character."

Baysek concedes that all but the last sentence of this instruction was proper. Indeed it was in almost exactly the language which he himself had requested. But he urges that the final sentence nullified what went before and indicated to the jury that they could disregard the character evidence if they were satisfied of his guilt from the other evidence. We see no merit in this contention. While it might, perhaps, have been better to have said, "If however, you are satisfied from all the evidence the Defendant is guilty, * * *" we think that this is the clear inference which the jury must have drawn from what the trial judge did say. For the sentence immediately followed a very full and fair statement of the duty of the jury to consider the character evidence with the other evidence in the case and to acquit the defendant if the character evidence, either alone or considered with the other evidence, raised a reasonable doubt of his guilt. By the language under attack which immediately followed the jury must have understood that if after such consideration of all the evidence, including the character evidence, they were satisfied beyond a reasonable doubt of the defendant's guilt thy should convict him even though he had offered evidence of good character. This was all that was required.[3]

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3. Edgington v. United States, 1896, 164 U.S. 361; Cohen v. United States, 3 Cir. 1922, 282 F. 871; United States v. Quick, 3 Cir. 1942, 128 F. 2d 832; United States v. Shanerman, 3 Cir. 1945, 150 F. 2d 491.

During his closing address to the jury Government counsel referred to certain statements in an exhibit offered by the defendant which was derogatory to one of the defendant's character witnesses, saying "that explains some of the reputation witnesses that you have heard." Baysek's counsel immediately objected and moved for the withdrawal of a juror which the trial judge denied. We see no error here. For Baysek's counsel in his own argument to the jury had described the character witnesses whom he had called as "top brass" and "high officials". Moreover Government counsel immediately asked the jury to disregard the matter so far as having any connection with the case was concerned. We are satisfied that no substantial prejudice to Baysek resulted.

The judgment of the district court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Sentence of the Court.

September 25, 1953. The sentence of the Court as to defendant, Joseph S. Baysek, Jr., is that said defendant be imprisoned for a period of three (3) years on Count No. 1. Count No. 2—five (5) years to run concurrently with sentence at Count No. 1. No fine. No costs. Stay of ten (10) days granted on execution of sentence.

BENJAMIN HARRISON, Judge
(Specially Assigned)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,180

UNITED STATES OF AMERICA
vs.
JOSEPH S. BAYSEK, JR.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, KALODNER and STALEY, Circuit Judges.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

May 14, 1954

RECEIVED & FILED
May 14, 1954
IDA O. CRESKOFF
Clerk

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,180

UNITED STATES OF AMERICA

v.

JOSEPH S. BAYSEK, JR.

Sur Petition for Rehearing.

Present: MARIS, KALODNER and STALEY, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

KALODNER

Dated:
July 9, 1954

RECEIVED & FILED
July 9, 1954
IDA O. CRESKOFF

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 265

JOSEPH S. BAYSEK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 21-25) is reported at 212 F. 2d 446.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1954 (Pet. 26). A petition for rehearing was denied on July 9, 1954 (Pet. 27), and the petition for a writ of certiorari was filed on August 7, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury on the effect of character testimony.

2. Whether the trial court should have declared a mistrial following a comment, made by Government counsel in closing argument, as to the credibility of one of petitioner's character witnesses.

3. Whether under the circumstances of the case petitioner was denied a fair trial by reason of a comment derogatory to his counsel made by the Government prosecutor.

STATUTE INVOLVED

18 U. S. C. 872 provides in pertinent part:

> Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined not more than $5,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both.

STATEMENT

Petitioner was tried and convicted in the District Court for the Western District of Pennsylvania of (1) aiding and abetting one Altmeyer, an officer of the Bureau of Internal Revenue, in extorting $4,101.18 purportedly as additional income

taxes due the United States, and (2) conspiring to commit that offense (P. R. 8a).[1] He was sentenced to concurrent terms of three years' imprisonment on count 1 and five years on count 2 (P. R. 12a). On appeal the judgment was affirmed (Pet. 26).

The sufficiency of the evidence to sustain the conviction is not challenged. The facts pertinent to the issues raised in the petition for certiorari may be summarized as follows:

Several witnesses testified in petitioner's favor as to his reputation in his community for being honest and law-abiding (G. R. 1a-9a; P. R. 13a-14a). As to the effect of character evidence the trial court charged as follows (P.R. 16a-17a):

> Where evidence is introduced by a Defendant of good character, that evidence of the good character of the Defendant is not mere makeweight, but is substantive evidence and must be considered by you, and may of itself raise a reasonable doubt in your mind, or, along with other evidence in the case, may raise a reasonable doubt in your mind as to the guilt of the Defendant, and therefore work an acquittal. The very object of introducing good character evidence is to generate in the minds of the jury a reasonable doubt as to the Defendant's guilt. The circumstances may be such that an established reputation for good

[1] The portion of the transcript printed in the appendix to petitioner's brief in the Court of Appeals will be referred to as "P. R.", and the portion printed in the appendix to the Government's brief in that court will be referred to as "G.R."

> character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing. If, however, you are satisfied the Defendant is guilty, you should convict him, notwithstanding proof of good character.

Petitioner objected to the instruction, claiming that the inclusion of the last sentence rendered it erroneous (P. R. 17a-18a).

Following petitioner's conviction, during the argument on his motion for a new trial, the court stated, in discussing this charge (P.R. 19a):

> *The Court:* Now Counsel, I have given that instruction considerable consideration, and I have also discussed it with some of the other members of the court, and I have arrived at this conclusion; that that instruction is not erroneous.

After further argument by petitioner's counsel, the following colloquy took place (P.R. 21a):

> *The Court:* Just a moment, counsel. There is no use in arguing over that instruction. I gave that instruction deliberately, and if I am in error the Circuit Court will correct it. I did that with, you might say, malice aforethought.
>
> *Mr. Rossi:* What was that?
>
> *The Court:* I gave that instruction, you might say, if it was a murder trial, with malice aforethought. That was the charge.

In summation to the jury, government counsel read from a statement given by another defendant, Barczak, a purported conversation between Altmeyer and Barczak in which the former told Barczak "I had pictures taken with the camera of Mr. Vittone", * * * "going into a racketeer's home, his automobile was parked in front of the racketeer's home, verifying it by the license plate number." Vittone had testified as a character witness for petitioner. Government counsel then remarked, "I think that explains some of the reputation witnesses that you have heard." Petitioner objected to this, and the following colloquy occurred (P.R. 15a-16a):

> *Mr. Rossi:* Now, just a minute, I want to be courteous, Mr. Owen, and not interrupt you, but I think that is stooping very low, to make such a statement, reflecting upon the character and integrity of Mr. Vittone, who is not on trial in this case and not having an opportunity to answer that. I think that's the law.
>
> *The Court:* Counsel, I think it's about six of one and a half dozen of the other. You may proceed. We are not prosecuting anybody but the Defendant in this case.
>
> *Mr. Owen:* No, I don't intend to, but I merely stated that to show that there may be some ill will on the part of Mr. Vittone against Mr. Barczak. I ask you to disregard it as far as it having any connection with this case. But I mentioned that to show the bias that is involved.

Petitioner thereupon requested that the court withdraw a juror and continue the case on the ground of improper remarks by government counsel which request the court denied.

Following the affirmance of petitioner's conviction by the Court of Appeals (Pet. 21-25), petitioner filed a motion for rehearing, based on matter not previously raised on appeal. In support of this motion, petitioner claimed that he had been denied a fair trial by reason of a conversation, which took place during the trial between counsel, involving a reference by Government counsel to petitioner's counsel as a "cheap chiseler". The conversation was not recorded in the trial transcript, although the matter was called to the trial court's attention by the colloquy which is set forth in the petition for certiorari at pp. 17-18.[2] The trial judge, though "within hearing distance", did not hear the comment and only learned of it when the matter was called to his attention by petitioner's counsel (Gov. App. p. 12, *infra*). The trial transcript does not indicate whether this comment was overheard by the jury. However, the court promptly admonished counsel not to engage in per-

[2] Though petitioner asserts this point in his petition for certiorari (Pet. 17-18), it is doubtful if this is properly before this Court, since petitioner has not filed in this Court, as required by its Rules, any portion of the record relating to the incident. The Government has filed the certified transcript of the proceedings in the district court on the hearing on petitioner's motion for new trial, and has printed from this transcript as an appendix to this brief (Gov. App. pp. 11-12, *infra*) a further colloquy between the court and counsel dealing with the incident.

sonalities and stated "if the Jury heard any comment of that kind, I am going to have it ordered struck" (Pet. 17).

ARGUMENT

1. There is no foundation for petitioner's claim (Pet. 14) that the trial court's charge respecting reputation for good character was in conflict with either *Edgington* v. *United States,* 164 U.S. 361, or *United States* v. *Quick,* 128 F 2d 832 (C.A. 3). The trial judge gave petitioner's requested instruction (P.R. 17a) almost *in haec verba,* with the added sentence, to which petitioner objected, "If, however, you are satisfied the Defendant is guilty, you should convict him, notwithstanding proof of good character." As the Court of Appeals noted, in its opinion by Judge Maris, this last sentence of the charge "immediately followed a very full and fair statement of the duty of the jury to consider the character evidence with the other evidence in the case and to acquit the defendant if the character evidence, either alone or considered with the other evidence, raised a reasonable doubt of * * * guilt" (Pet. 24). In context, the quoted sentence clearly conveyed to the jury the meaning that, if after such consideration of all the evidence, including the character evidence, they were satisfied beyond a reasonable doubt of petitioner's guilt they should convict him; in other words, that previous good character, though proved, could not affect the decision unless it caused doubt as to guilt. It was clearly within the rule of the *Edgington* case.

2. The reference by government counsel to the

statements in the exhibit which were derogatory to one of petitioner's character witnesses did not constitute error. Petitioner had evidently attempted to use the witness' position as a government official as suggestive of his value as a character witness, and the prosecution had a right to rebut the inference by reference to matters in evidence. *Myres* v. *United States,* 174 F. 2d 329 (C.A. 8), certiorari denied, 338 U.S. 849; *Himmelfarb* v. *United States,* 175 F. 2d 924 (C.A. 9), certiorari denied, 338 U.S. 860. The prosecutor's reference in this case was to an exhibit which petitioner had himself introduced in evidence and to a part thereof which petitioner had asked the jury to read (G.R. 12a-13a).

Moreover, as the court below noted (Pet. 25), government counsel explained his reason for the reference and asked the jury to disregard it so far as the case was concerned. It is thus evident that petitioner is trying to magnify the importance of a very minor occurrence during summation.

3. Petitioner's contention, involving the single reference to his counsel as a "cheap chiseler", is likewise magnified beyond all proportion. The incident occurred not in argument, but in a conversation between counsel, which the court, though within hearing distance, did not hear (Gov. App. p. 12, *infra*). There is no indication in the trial transcript that this remark was heard by the jury. In any event, the judge promptly reprimanded Government counsel and stated that "if the Jury heard any comment of that kind, I am going to have it or-

dered struck" (Pet. 17). Since no further instruction to the jury was requested by petitioner's counsel or given by the court, it would appear that all concerned considered at the time that the action taken by the court fully covered the situation. A trial court is necessarily given wide discretion in such areas. *Aeby* v. *United States,* 206 F. 2d 296 (C.A. 5), certiorari denied, 346 U.S. 885. Petitioner's initial judgment that the matter was not of sufficient importance to include in the record or argue on appeal was a sound appraisal of the significance of the incident to the trial.

This is wholly unlike the case of *Volkmor* v. *United States,* 13 F. 2d 594 (C.A. 6), with which petitioner claims that the holding below is in conflict. In that case, Government counsel, during jury argument, made a number of derogatory and highly inflammable characterizations of defendant, over repeated objections. As noted in the court's opinion in *Volkmor,* "if an objection is made to an improper argument, and the court sustains the objection, or counsel withdraws the improper remark, the error will generally be deemed to be cured", 13 F. 2d at 595. The case held that a jury verdict should be set aside only when the prejudicial argument "appears so egregious as to have affected the minds of the jury, despite the attempted correction." No such situation is presented in this case. *Volkmor* v. *United States, supra,* and *United States* v. *American Die & Instrument Works, Inc.,* 213 F. 2d 731 (C.A. 3), both relied upon by petitioner (Pet. 15-18), are clearly distinguishable on their facts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

SEPTEMBER 1954.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 13799 Criminal

UNITED STATES OF AMERICA

v.

JOSEPH S. BAYSEK, JR.

(Transcript of Proceedings of Hearing on Motion for New Trial and Imposition of Sentence, September 25, 1953, before Honorable Benjamin Harrison, Judge (specially assigned))

Page 17:

Mr. ROSSI: Now, we come to another proposition. That was the insult hurled to me. Of course, I have been insulted by the Court today also, but the remark by Mr. Knapp's assistant, Mr. Owen, in calling me——

Mr. KNAPP: I would rather have him call him my friend and colleague, as he is, your Honor.

The COURT: I don't care what counsel call each other.

Mr. ROSSI: In referring to me as a "cheap chiseler."

The COURT: You want to remember, counsel, that that was not called to the attention of the jury, except by you.

Mr. ROSSI: It was heard. It was heard by all the people.

The COURT: I didn't hear it. And I was within hearing distance. And you were the one that raised the question and made it known to the jury, by your objection. I didn't hear it and didn't know anything about it. It was something in conversation between counsel, between tables, when something was asked for.

Mr. ROSSI: He stood up, his whole six feet, and said it.

The COURT: I didn't know anything about it until you called the Court's attention to it.

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